No. 85-361

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1985

IRVING R. BYKOFSKY,

Petitioner,

against

ROBERT L. HESS as President of Brooklyn College of the City University of New York and the BOARD OF TRUSTEES OF THE CITY UNIVERSITY OF NEW YORK,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

MEMORANDUM IN OPPOSITION

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MEMORANDUM IN OPPOSITION

Petitioner was an administrator at Brooklyn College of the City University of New York until the close of the 1980-81 academic year when his employment contract was not renewed. Appendix to the petition ("pet. app.") 3a. He seeks review of a judgment of the New York Court of Appeals which summarily affirmed the dismissal of his civil rights complaint by the Appellate Division of the Supreme Court for failure to state a cause of action. Pet. app. 9a, 15a. The complaint alleged that respondents' failure to

renew petitioner's contract for the 1981-82 academic year denied him due process of law. Pet. app. 2a.

The petition is insufficient because it does not give any reason under Supreme Court Rule 17(1) for granting review. No conflict with a decision of a federal court of appeals or a state court of last resort is alleged. Moreover, applicable decisions of this Court in *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), and *Perry* v. *Sindermann*, 408 U.S. 593 (1972), establish that petitioner did not have a protected due process interest in the renewal of his employment contract with Brooklyn College.

In *Board of Regents* v. *Roth*, this Court said that property interests are created and their dimensions defined by existing rules and understandings that stem from an independent source such as state law. 408 U.S. at 577. Thus, Roth's property interest in employment was created and defined by the terms of his appointment, which, like those of petitioner here, did not secure any interest in re-employment for the following year. 408 U.S. at 578; pet. app. 6a-7a. In *Perry* v. *Sindermann*, this Court said that a property interest could arise from a *de facto* tenure program as evidenced by a college's written guidelines. 408 U.S. at 600. Here, the Appellate Division found that the written policy in effect at Brooklyn College stated explicitly that administrators in petitioner's job classification were only entitled to consideration for one year contracts and that no other written or unwritten policies granted any interest in continued employment. Pet. app. 7a.

Vail v. *Board of Education of Paris Union School District No. 95*, 706 F.2d 1435 (7th Cir., 1983), affirmed by

an equally divided court, —— U.S. ——, 104 S.Ct. 2144 (1984) (*per curiam*), is readily distinguishable. There, the Seventh Circuit upheld a district court finding that a college athletic director had a protected due process interest in continued employment when he was terminated after working for one year under an undisputed promise of employment for two years. 706 F.2d at 1438. Here, the Appellate Division found that petitioner's last annual appointment under the written policy in effect at Brooklyn College expired at the close of the 1980-81 academic year. Pet. app. 3a.

The Appellate Division further found, as a matter of law, that petitioner's reliance on an exchange of letters with with respondent Hess in April and May 1980 and an alleged contemporaneous oral understanding to reappoint him for the 1981-82 academic year did not create a protected due process interest. Pet. app. 8a. According to the court, the exchange of letters did not include a promise to reappoint petitioner for 1981-82, and any alleged oral understanding to reappoint him for that academic year was unenforceable under the state Statute of Frauds. *Ibid.*; New York General Obligations Law § 5-70(a)(1) (McKinney 1978).

Thus, the state law issues and underlying facts decided in petitioner's favor by the lower courts in *Vail* were decided adversely to petitioner here. Neither can be reviewed by this Court. *Fox Film Corp.* v. *Muller,* 296 U.S. 207, 210-211 (1935) (state court decisions based on adequate nonfederal grounds will not be reviewed); *Berenyi* v. *Immigration Director,* 385 U.S. 630, 635 (1967) (concurrent findings of fact will not be reviewed absent obvious error). As a result, petitioner here, unlike petitioner in *Vail,* cannot show this Court any independent state law

source for a protected due process interest in his reappointment for the 1981-82 academic year.

The same result follows if petitioner is claiming that respondent Hess only promised to cooperate in his reappointment effort. Petition at i, 8. Since the April and May 1980 exchange of letters does not include a promise of any kind (*id.* at 8-10), and any oral understanding would be unenforceable, petitioner cannot allege more than a subjective expectancy in continued employment which this Court has said is without constitutional dimension. *Perry* v. *Sindermann,* 408 U.S. at 603.

Therefore, the petition for writ of certiorari should be denied.

Dated: New York, New York
October 29, 1985

Respectfully submitted,

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